IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LILLIAN B. GOMBERG, on behalf of herself and all others similarly situated Plaintiff	:	CIVIL ACTION
v.	:	
WESTERN UNION CORPORATION, WILLIAM WEKSEL, WESTERN UNION TELEGRAPH CO., ROBERT J. AMMAN, DREXEL BURNHAM LAMBERT, INC., and BENNETT S. LEBOW Defendants	:	NO. 89-8499

MEMORANDUM AND ORDER

Yohn, J. June , 1997

Plaintiff brought this class action on behalf of owners of preferred shares and debentures of Western Union Corporation (Western Union), alleging securities laws violations against Western Union, Western Union Telegraph Company (WUTCO), various Western Union directors, and the securities firm of Drexel Burnham Lambert, Inc. (Drexel).

Pursuant to Federal Rule of Civil procedure 23(e), the parties have petitioned the court for certification of a proposed settlement class, approval of the proposed settlement, and approval of the application for costs and attorneys' fees in the action against all the defendants other than Drexel. On October 24, 1996, the court granted provisional approval of the proposed settlement and on or before November 15, 1996, notice of the proposed settlement, settlement hearing, and right to appear was mailed or otherwise forwarded to over 60,000 putative class

members.

In addition, plaintiff has presented claims on behalf of herself and the class against Drexel in the Drexel bankruptcy proceedings in the Southern District of New York. A final order has been entered in that bankruptcy, In re Drexel Burnham Lambert Group, Inc. et al., Case No. 90 B 10421 (FGC) (Bankr. S.D.N.Y), and affirmed on appeal, Case No. 90-6954 (MP) (S.D.N.Y. Aug. 18, 1994), releasing all claims asserted against Drexel, including this action. As part of the procedures established by the bankruptcy court, the bankruptcy court and the district court certified plaintiff's claims for class action treatment, and approved settlement of class claims against Drexel for $13,000,000. However, substantially less than this amount will be distributed because total estimated claims against Drexel will greatly exceed funds available for distribution. Under the conditions established by the District Court for the Southern District of New York, these funds will be deposited in an escrow account along with funds obtained from Western Union defendants, and distributed to class members according to distribution procedures established by this court as "home court."

Following a hearing held on January 31, 1997, and after consideration of the parties' submissions, the court concludes that plaintiff has satisfied the requisites for class certification and that the proposed settlement of claims against the Western Union defendants is fair, reasonable, and adequate. Similarly, the court will grant approval for plaintiff's claims

for costs and attorneys' fees with respect to the settlement of claims against Western Union.

In addition to approving the settlement of class claims against Western Union, the court must rule on plaintiff's request for attorneys' fees with respect to the settlement of class claims against the Drexel Estate. Counsel for plaintiff has requested attorneys' fees equal to twenty five percent of the recovery against Drexel. The court will address that request in section III.F of this opinion.

I. FACTUAL BACKGROUND

In an initial prospectus dated September 21, 1987, Western Union announced plans to restructure the company pursuant to an Amended and Restated Plan and Agreement of Reorganization dated May 7, 1987. The plan was in response to significant net financial losses that Western Union had experienced in the 1980s; Western Union's net cash flow had been insufficient to fund needed capital investments, service debts, and make normal contributions to Western Union's pension trust funds. The proposed merger plan included the following details: WUTCO, a subsidiary of Western Union, would be merged with its parent, the surviving company being a single entity named Western Union; the surviving corporation would issue $500 million of Senior Secured Reset Notes (reset notes); and with the money raised by the reset notes, the surviving company would acquire ITT World Communications, Inc. (Worldcom).

In addition, the merger plan provided that holders of preferred shares of Western Union and WUTCO would receive shares of Class A Senior Preferred Shares (Class A share) and Class B Cumulative Convertible Preferred Shares (Class B shares) of the surviving company. Class A shares had a liquidation value of $100.00 per share and an initial dividend rate of $13.50 per share per year. Class B shares had a liquidation value of $25.00 per share, and were convertible at any time into common stock at an exchange rate of approximately 5.26 common shares for each Class B share. The merger plan set forth varying exchange rates for the different types of existing Western Union and WUTCO preferred shares and debentures. Owners of WUTCO 10 3/4% subordinate debentures received 2.4 $15.00 Class A shares and 14.4 $3.00 Class B shares for each $1,000.00 principal amount of debenture.

On October 27, 1987, Western Union issued a second prospectus containing revised terms, which prospectus was supplemented on or about December 18, 1987 (collectively, the "exchange prospectus").

On or about December 30, 1987, Western Union commenced the public offering for the $500 million reset notes, which were sold to the public pursuant to a prospectus bearing the date of December 16, 1987 (the "reset note prospectus"). Defendant Drexel was the underwriter for the reset notes, as well as financial advisor to Western Union in the restructuring.

On or about December 30, 1987, Western Union merged

with WUTCO.

On November 29, 1988, Western Union's Board of Directors voted to omit the quarterly dividends on Class A and Class B shares. By then, the board had realized that the corporation's restructuring would require additional time and that the corporation needed to retain available funds for business operations.

On November 28, 1989, plaintiff M. Harrison Bohrer filed a class action complaint against Western Union, WUTCO, Drexel, and various directors of Western Union. A three count amended complaint was filed on June 11, 1990.[1] As part of the merger, Bohrer had exchanged $20,000 face value WUTCO 10 3/4% subordinated debentures for 48 Class A shares and 288 Class B shares. Count I of the amended complaint alleged that the Western Union defendants and Drexel had violated sections 10(b) and 20 of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder, while Count II alleged violations of sections 11, 12, 15 of the Securities Act of 1933. Specifically, plaintiff alleged that defendants engaged and participated in or aided and abetted a continuous course of conduct and conspiracy to conceal adverse material information regarding the finances, financial condition and future prospects of the corporation.

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[1] M. Harrison Bohrer died sometime after filing the initial complaint. On February 28, 1997, the court approved the parties stipulation to substitute Bohrer with the administrator of Bohrer's estate, Bohrer's daughter Lillian B. Gomberg, as named plaintiff and proposed class representative, nunc pro tunc from October 11, 1990.

Bohrer alleged that he obtained Class A and B shares at an inflated price as a result of defendants' overly optimistic representations concerning the corporation's future financial well-being.

Bohrer brought Count I and II as a class action under Fed. R. Civ. P. 23(a) and 23(b)(3) on behalf of three subgroups: (1) all holders of WUTCO 10 3/4 subordinated debentures who exchanged such debentures for Class A and Class B shares pursuant to the prospectus dated October 27, 1987 as part of the Western Union and WUTCO merger and who sustained damages as a result; (2) all persons who acquired Western Union securities from December 30, 1987 through November 29, 1988, inclusive; and (3) all persons who acquired Senior Secured Reset Notes pursuant to the public offering on or about December 30, 1987.

In addition, Count III of the amended complaint alleged a breach of fiduciary duty claim on behalf of Class A and Class B shareholders and sought injunctive relief and compensatory damages in connection with a second proposed recapitalization plan. That plan was not implemented, and the parties have moved to dismiss Count III as moot.

II. PROCEDURAL BACKGROUND

On May 29, 1990, five months after plaintiff commenced this action, Drexel filed for bankruptcy. All claims against Drexel were stayed here and plaintiff filed a proof of claim on behalf of herself and others similarly situated in Drexel's

bankruptcy proceedings in the bankruptcy court and district court for the Southern District of New York. Both the bankruptcy court and the district court certified plaintiff's claims against Drexel for class action treatment. On behalf of that certified class, plaintiff presented a claim against the Drexel Estate through a claim process. On May 3, 1991, plaintiff negotiated with representatives of the Drexel Review Committee a $13,000,000 settlement of class claims against Drexel, which settlement was approved by the bankruptcy court, and subsequently the district court. The present cash value of that settlement is $1,690,078.

Pursuant to procedures established by the bankruptcy court, each class action that presented a claim against the Drexel Estate was, after determining the value of the claim, to return to its "home court" for conclusion of remaining aspects of the litigation and distribution and administration of the settlement. This court has been asked to be a "home court," regardless of the outcome of claims against the Western Union defendants.

In the meantime, on August 15, 1990, the Western Union defendants filed a motion to dismiss plaintiff's complaint pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6). Plaintiff responded and the court denied defendants' motion by order dated April 12, 1991.

Subsequently, the parties entered into discovery; defendants produced and plaintiff reviewed tens of thousands of pages of documents.

On October 1, 1991, plaintiff filed a motion for class certification. Defendants opposed certification on procedural grounds and on Rule 23(a) grounds. The court did not rule on plaintiff's motion because on November 15, 1991, the reset note holders filed an involuntary bankruptcy petition against Western Union, by then renamed "New Valley Corporation."[2] On January 3, 1992, as a result of the bankruptcy proceedings, the parties entered into a stipulation to stay proceedings in this suit and the court placed the case in civil suspense.

On July 9, 1993, plaintiff filed a proof of claim on behalf of plaintiff and the class in Western Union's bankruptcy proceedings in the Bankruptcy Court for the District of New Jersey. Although the date is not clear, at some point Western Union defendants and plaintiff agreed to a proposed settlement of class claims for $300,000 and, pursuant to the terms of the stipulation of settlement, the parties applied for approval from the bankruptcy court of the funding for the proposed settlement.

The settlement provides that for the purpose of allocating funds, the class is divided into two groups. The first group is comprised of persons who exchanged WUTCO 10 3/4% subordinate debentures for Class A and B shares, and persons who purchased Western Union securities between December 30, 1987 and November 29, 1988. This group will have its total loss assessed at 10% of the difference between the price paid for the

[2] To avoid confusion, this opinion will continue to refer to defendant as Western Union.

securities, or the value of the securities at the time of the reorganization if shares were acquired in the merger exchange, and the price of the securities on November 30, 1988, or the selling price if sold before that date. The second group is comprised of persons who purchased reset notes at the December 30, 1987 public offering. The total damages for this group are determined as the full value of the difference between the price paid on December 30, 1987 and the market price on November 30, 1988, or the price when sold if sold before that date.

The bankruptcy court conducted a hearing to determine whether the proposed payment from the Western Union Estate was a fair expenditure and whether the payment was fair to other Western Union creditors. The bankruptcy court did not make factual findings with respect to class certification but, nevertheless, approved the settlement and, subsequently, the $300,000 proposed settlement sum was transferred to an escrow account for distribution, pending this court's final approval of settlement.

On November 1, 1994, the bankruptcy court confirmed Western Union's Joint Chapter 11 plan of reorganization and on January 18, 1995, Western Union emerged from bankruptcy.

On September 6, 1996, plaintiff and Western Union defendants entered into a stipulation of settlement and filed such stipulation with this court, requesting approval of the class action settlement. By order filed October 24, 1996, the court, after a hearing, granted provisional class certification

and approval of settlement, and ordered that the parties provide notice to the proposed class of the settlement embodied in the stipulation of settlement.

Shortly thereafter, on November 15, 1996, plaintiff caused 30,867 notices to be mailed to individuals and companies identified as putative class members by defendant's record, and caused 1,337 notices to be mailed to various nominees and brokers. In response to notice sent to nominees and brokers, requests for an additional 29,437 notices were received, so that in total in excess of 60,300 putative class members were notified. The notice informed potential class members of the terms of the settlement and that the court would hold a hearing on January 31, 1997 to determine the fairness of the settlement. The notice further informed potential class members that any member wishing to be excluded from the class or wishing to object to the proposed settlement or award of attorneys' fees must submit their objections in writing no later than January 31, 1997. On December 12, 1996, plaintiff's counsel filed an affidavit with this court attesting to the notice mailing.

On January 31, 1997, the court conducted a hearing on plaintiff's motion for class certification and final approval of settlement, and on plaintiff's petition for an award of costs and attorneys' fees. No potential class members objected to the settlement either in writing or at the fairness hearing. Six potential class members have lodged exclusion requests.

III. DISCUSSION

Federal procedure requires that a class action not be dismissed or compromised without court approval and notice to class members. Fed. R. Civ. P. 23(e). Before approving a class action settlement, the court must ensure that the terms are "fair, adequate, and reasonable" to the class. Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975). With respect to settlement classes, the court must first make factual findings that the requisites for class certification have been met. In re GM Pick-Up Truck Litig., 55 F.3d at 794.

A. Class Certification Requirements of Rule 23

In defendants' November 4, 1991 memorandum in opposition to plaintiff's motion for class certification, defendants raised certain procedural objections to certification. Defendants argued that plaintiff had failed to show good cause for failure to move for class certification within 90 after filing the complaint as required by Local Rule of Civil Procedure 27(c), now Rule 23.1(c). In addition, defendants asserted that the Bohrer's Estate could not be class representative because an estate is not a proper legal entity. Defendants no longer press these objections.

The court finds that there is good cause to overcome the requirements of Rule 23.1(c) because the parties have treated the asserted claimants as a class throughout the litigation, including during the bankruptcy proceedings in New Jersey.

Further, in reliance on the pendency of their motion to dismiss the complaint, defendants declined to participate in discovery until determination of their motion. In response, plaintiff delayed moving for class certification because it would have been imprudent to proceed with a motion for certification without an opportunity for discovery.

Similarly, the court finds no evidence that defendants' were prejudiced by the delay. Defendants initially contended that they were prejudiced by the delay because they were unable to depose Bohrer prior to his death or key Western Union employees with relevant information who had left the corporation. Further, defendants argued that because of the corporation's declining financial condition, the delay had hurt Western Union's ability to fund a defense. However, none of these alleged prejudicial effects were caused by plaintiff's delay. Defendants did not depose Bohrer because they insisted on not proceeding with discovery until the disposition of their motion to dismiss. Again, nothing precluded defendants from interviewing their own personnel once notified of plaintiff's claim. Finally, there is no evidence that Western Union cannot afford a defense; Western Union defendants continue to be represented by nationally recognized counsel.

Defendants' initial objection concerning the identity of the named plaintiff has merit. After Bohrer's demise, the second amended complaint substituted Bohrer with the Bohrer Estate. However, under Pennsylvania law, an estate is not a

legally existing person. See In re Harrisburg Trust Co., 80 Pa. Super. 585, 586 (1923). Cf. Fed. R. Civ. P. 17(b) (stating that in federal court, issues of capacity to sue are governed by state law).

However, although an estate cannot serve as named plaintiff, the administrator or executor of the estate may maintain an action to enforce any right or liability that survives the decedent. Myers v. Estate of Wilks, 655 A.2d 176, 178 (Pa. Super. Ct. 1995). To resolve this issue, defendants and counsel for plaintiff have stipulated to the substitution of the Bohrer Estate with the administrator of Bohrer's estate, Bohrer's daughter Lillian B. Gomberg. By order dated February 28, 1997, the court granted the parties' stipulation of substitution, nunc pro tunc from October 11, 1990.

Turning to the substance of plaintiff's certification request, Federal Rule of Civil Procedure 23(a) sets forth the following requirements for certification of a class action:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impractical, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

In addition, Rule 23 requires that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members" and "a class action is

superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

The court finds that plaintiff has met the numerosity, commonality, predominance, and superiority aspects of class certification: defendants' records and other sources identified over 60,000 potential class members; the three putative sub-classes share common issues of fact and law--namely, whether defendants concealed adverse material information regarding the finances, financial condition and future prospects of Western Union; the shared claims of the class predominate over any individual claims; and, with over 60,000 potential class members, a class action is superior to other methods for resolving such claims. See Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir. 1970) (holding that class action is superior to other available methods for fair and efficient adjudication of suits involving large number of security holders injured by violations of federal securities laws).

The fact that Bohrer held Class A and B shares but was uninvolved with purchasing the reset notes or other Western Union securities raises questions with respect to typicality. The proposed class comprises three subclasses of investors: (A) persons who acquired Class A and B shares in exchange for WUTCO 10 3/4 subordinate debentures in the 1987 financial restructuring; (B) all persons who acquired Western Union securities during the class period; and (C) all persons who acquired the reset notes pursuant to the public offering.

Claims asserted on behalf of subclass B require proof of a higher degree of defendant culpability than those of subclasses A and C. The amended complaint asserts claims on behalf of subclasses A and C under § 11 and § 12 of the Securities Act of 1933 and § 10(b) and § 20 of the Securities Exchange Act of 1934. For subclass B, the amended complaint asserts claims under § 10(b) alone. To prove an offense under §11 and §12 of the 1933 Securities Act, plaintiff must show reliance and damages as a result of material misrepresentations or omissions made by an issuer. The remedy is that the buyer recovers the consideration paid for the securities minus any income received thereon. Negligence on the part of the issuer in misrepresenting material information is sufficient to establish a claim under the 1933 Act. 15 U.S.C. § 77k, 77l.

In contrast, claims under § 10(b), and Rule 10b-5 promulgated thereunder, require proof of scienter, which must be proven by showing the defendants lacked "a genuine belief that the information disclosed was accurate and complete in all material respects." McLean v. Alexander, 599 F.2d 1190, 1198 (3d Cir. 1979). Recklessness on the part of defendants also meets the scienter requisite where the defendants' conduct is an extreme departure from the standard of ordinary care. In re Phillips Petroleum Securities Litigation, 881 F.2d 1236, 1244 (3d Cir. 1989). The fraudulent conduct does not have to be by the seller and, hence, §10(b) claims may be asserted against corporations by persons buying and selling on the open market.

Therefore, plaintiff can recover by proving defendants were negligent in misrepresenting or omitting material facts in various disclosures and, consequently, plaintiff may have no incentive to marshall the evidence of extreme reckless or knowing misconduct required in order for subclass B to recover.

Additionally, subclass A has considerably more obstacles to overcome to prove damages and causation than subclasses B and C, who brought new money to Western Union. Subclass A members obtained Western Union shares in exchange for WUTCO subordinate debentures, which were of dubious value in light of WUTCO and Western Union's threatened bankruptcy.

Nonetheless, the court concludes that the case meets the typicality requisite despite differing requirements and problems of proof of culpability, causation and damages among the subclasses. Rule 23(a) does not require that class members share every factual and legal predicate to meet the typicality requirement. Baby Neal v. Casey, 43 F.3d 48, 56 (3d Cir. 1994). "The typicality criterion is intended to preclude certification of those cases where the legal theories of the named plaintiffs potentially conflict with those of the absentees by requiring that the common claims are comparably central to the claims of the named plaintiff as to the claims of the absentees." Id. at 57 (citing Weiss v. York Hosp., 745 F.2d 786, 810 (3d Cir. 1984)). Cases usually meet the typicality requirement when the challenged conduct affects both named plaintiffs and the putative

class members. Id. at 58 (citing H. Newberg & A. Conte, 1 Newberg on Class Actions § 3.13 (1992)). "[E]ven pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories." Id. Here, there are no conflicts between the classes because the evidence of misrepresentation and omission required by each sub-group would be identical. The central facts plaintiff must establish to recover losses relating to her Class A and B shares are the same facts that the market purchasers and reset note purchasers must prove: that the entire package of information disseminated by defendants was deceptive. Further, any discrepancy between the relative strengths of the different sub-groups in proving causation and damages can be resolved by varying allocations of damages among the subclasses.

Similarly, the proposed class meets the adequacy of representation requisite, which has two components: first, whether the named plaintiff's claims are sufficiently aligned with the absentees and, second, whether class counsel is qualified to represent the class. Weiss v. York Hospital, 745 F.2d 786, 810 (3d Cir. 1984). The issues raised by the first component are the same as those for typicality and, as concluded above, the court is satisfied that there are no antagonisms within the class.

The second component of the adequacy of representation prong examines whether class counsel possesses adequate experience, vigorously prosecuted the action, and acted at arms

length from the defendant. Id. at 801. Here, the court is satisfied that counsel for plaintiff possesses the skill and experience required to pursue this action. Lead counsel for plaintiff, R. Bruce McNew, Esq., has been a member of the Delaware bar since 1979 and the Pennsylvania bar since 1984, and has represented classes of investors as both lead and co-lead counsel in the prosecution of a number of major securities and defense contractor fraud cases, in addition to having experience in cases involving claims on behalf of equity securities holders against various financial institutions.

The court is also satisfied that counsel for plaintiff vigorously pursued the claim. Prior to settlement, plaintiff opposed and successfully defeated defendants motion to dismiss and plaintiff moved for initial class certification when the parties were still litigating. Further, plaintiff conducted extensive discovery of all documents available from any source. This consisted of reviewing approximately 50,000-100,000 documents in over 130 boxes involving Western Union, and the indices of documents from the Drexel document depository and the relevant files contained therein. Although no depositions were conducted, none were necessary in that this was primarily a document case.

Similarly, the parties conducted settlement negotiations at arms length. The settlement was negotiated independent of the bankruptcy proceedings and, once finalized, was only then submitted to the bankruptcy court for approval.

The settlement reflects estimates of the merits of the claim against Western Union defendants by counsel who are experienced in similar litigation and, (as will be explained below in the section of this opinion addressing the fairness), the settlement is reasonable in light of the defenses available to Western Union defendants.

In sum, the proposed class meets the requisites for class certification.

B. Adequacy of Notice

Federal Rule of Civil procedure 23(e) mandates that a class action shall not be dismissed or compromised without prior notice to the class in a form prescribed by the court. "The plaintiff must receive notice and an opportunity to be heard and participate in the litigation, whether in person or through counsel." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985). To satisfy due process, the notice must be sufficiently informative of the action and plaintiff's rights, and give sufficient opportunity for response. Id. The court is required to disseminate "to all members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2). The type of notice given is subject to the trial court's discretion. Kyriazi v. Western Elec. Co., 647 F.2d 388, 395 (3d Cir. 1981).

The court is satisfied that class members were given

the best notice practicable. The court approved the form and content of the notice in the court's order dated October 24, 1996, and over 60,000 individual notices were mailed to potential class members identified in the records of New Valley Corporation and identified in response to notices mailed by the class administrator to various nominees and brokers.

C. Fair, Reasonable and Adequate Settlement

When considering whether to approve a settlement, the court must determine whether the settlement is fair, reasonable, and adequate. Girsh v. Jepson, 521 F.2d 153, 156-57 (3d Cir. 1975). "[T]he law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." In re GM Pick-Up Truck Litig., 55 F.3d at 784. However, the court as guardian of the rights of absent class members is required to "independently and objectively analyze the evidence before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished." Id. at 785. "[T]he settlement must be both substantively reasonable compared to the likely rewards of litigation, and the result of good faith, arms length negotiations." Fickinger v. C.I. Planning Corp., 646 F. Supp. 622, 627 (E.D. Pa. 1986). The decision whether to approve a settlement is for the sound discretion of the trial court, and that determination is reversible only for abuse of discretion. Bryan v. Pittsburgh Glass Co., 494 F.2d 799, 801 (3d Cir. 1974).

The Third Circuit has listed the following nine factor test as relevant in determining whether a settlement is fair, reasonable, and adequate: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the risk of not establishing liability; (5) the risk of not establishing damages and other relief; (6) the risks of not maintaining the class action through the trial; (7) the defendants' ability to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. Jepson, 521 F.2d at 157. Where settlement negotiations were commenced prior to class certification, the court must apply a heightened scrutiny of the settlement. In re GM Pick-Up Truck Litig., 55 F.3d at 805.

1. The complexity, expense and likely duration of the litigation

This factor is intended to capture "the probable costs, in time and money, of continued litigation." Bryan, 494 F.2d at 801. Resources saved in not having to continue litigation is a factor weighing in favor of settlement. Id. Here, this factor is neutral because there is nothing particularly unusual about the case. Although there would be need for the jury to understand the defendants' business plans and for expert

testimony on damages, such complexity is not unusual in securities litigation.

2. The reaction of the class to the litigation

The lack of objectors is a relevant factor in favor of approving settlement. Bell Atlantic Corp. v. Bolger, 2 F.3d 1304, 1315-16 (3d Cir. 1993). However, the number of objectors is not the most significant factor to be weighed in considering the fairness of a settlement. The Third Circuit has opined that in securities cases, the number of registered objectors understates the level of dissatisfaction with the settlement among the class because many shareholders have little incentive to contest a settlement in that the cost of contesting the settlement exceeds the shareholder's pro rata share of the settlement. In re GM Pick-Up Truck Litig., 55 F.3d at 812. But see In re Residential Doors Antitrust Litigation, 1996 WL 751550, *7 (E.D. Pa. Dec. 31, 1996).

Here, even given the standards set forth in In re GM Pick-Up Truck Litig., the reaction of objectors is a factor favoring settlement. There were no objectors and only six exclusions among more than 60,000 persons who received notice. In addition, in the bankruptcy proceedings, the other creditors objected that the settlement was too generous to the class members; however, those objections were eventually withdrawn.

3. The stage of the proceedings and the amount of discovery completed

This factor examines the time and effort expended by counsel for plaintiff prior to settlement in order to ascertain whether counsel had sufficient understanding of the merits of the case to be able to adequately negotiate on behalf of the class. In re GM Pick-Up Truck Litig. 55 F.3d at 813. The pertinent factors are the time elapsed from the commencement of the case to settlement, and the nature and amount of discovery and investigations conducted to develop the merits during such period. Id.

Over seven years have elapsed since plaintiff filed suit. In that time, the parties have briefed both the class certification issues and the merits of plaintiff's legal claim though defendants' motion to dismiss. In addition, plaintiff's counsel has reviewed tens of thousands of documents of both Western Union and Drexel, and has commissioned damages analysis by both in-house experts and a local investment banking firm. Although plaintiff did not conduct any depositions, that fact reflects the nature of plaintiff's case rather than that settlement was premature.

The court would normally conclude that this history of discovery would meet the articulated standard set forth in In re GM Pick-Up Truck Litig. by the court of appeals. However, when the amount of discovery here is compared to the amount of discovery conducted in the GM Pick-Up Truck case, which was found inadequate by the court of appeals, I must conclude that this factor has not been met satisfactorily and is, therefore, a

negative factor in evaluating the fairness of settlement.

4. The risk of not establishing liability

Here, plaintiff faces an uphill task in establishing liability at trial. At the fairness hearing, plaintiff's counsel estimated that the chances of success against Western Union were 15% at most. Plaintiff would need to prove that defendants falsely portrayed that the 1987 restructuring was more favorable than the alternative, bankruptcy. For this, plaintiff would have to demonstrate that defendants did not believe the reorganization had a chance to succeed. Absent a defendant admission, plaintiff would have to come forward with evidence to prove that the plan presented by Drexel was so lacking in detail or premised on such unrealistic assumptions that Western Union defendants could not have believed it. However, the Drexel plan was detailed in its analysis. Consequently, plaintiff would have the difficult task of proving that the plan's underlying assumptions were unrealistic and that defendants were aware that the assumptions were unrealistic.

Additionally, defendants would assert the "bespeaks caution" doctrine. Under this doctrine, sufficient cautionary language accompanying an offering document's forecasts, opinions or projections renders alleged omissions and misrepresentations immaterial as a matter of law. Kline v. First Western Government Securities, Inc., 24 F.3d 480, 489 (3d Cir. 1994). "The disclaimer must relate directly to that on which investors claim

to have relied." Id. Here, defendants would have strong arguments that no reasonable person could possibly have been misled by the likelihood of success of the reorganization plan in that Western Union disclosed its dire financial situation in the October, 1987 prospectus.

For the individual defendants, plaintiff's counsel estimated the chances of success at 10% because under § 11, every person other than the issuer has a due diligence defense. Here, the individual defendants would claim reasonable reliance on the advice and expertise of Drexel. To overcome that defense, plaintiff would have to establish that defendants lacked subjective belief in Drexel's conclusions. Plaintiff's task in proving lack of subjective belief would be facilitated if plaintiff could show that defendants had a motive for proceeding improperly. In the amended complaint, plaintiff alleged that individual defendants benefitted from the restructuring which allowed them to acquire control of Western Union. However, it appears that only Drexel profited materially from the restructure, while defendant Bennett S. LeBow lost an additional $25 million invested in Western Union as part of the reorganization. Indeed, LeBow's personal losses adds credence to his claim that he relied on predictions by Drexel concerning the likely success of the restructuring.

The court finds that counsel's estimates are reasonable and that the risk of establishing liability at trial was very substantial, if not overwhelming. This factor strongly favors

settlement.

5. The risk of not establishing damages and other relief

Even if liability were established, plaintiff would face substantial risks in establishing that securities holders experienced damages as a consequence of defendants' misrepresentations. Regarding subclass A--persons who obtained Class A and B shares as part of the corporate restructuring--plaintiff would have to show that Class A and B shares were worth less than the value of the pre-merger WUTCO 10 3/4% subordinate debentures. Defendants could argue that there were no damages because the company was in a better position after the reorganization. To rebut, plaintiff would in effect have to prove that bankruptcy in 1987 was a more preferable option than bankruptcy in 1990. Additionally, the infusion of fifty million dollars of new capital and the acquisition of a new business substantially changed the picture with reference to Western Union so that it would be difficult to correlate the new company to the old. Most telling, at the fairness hearing, plaintiff's counsel admitted that their damage experts opined that damages would probably be zero or not much more.

With respect to claims relating to new investments in Western Union, plaintiff would have to show that the decline in the market value of the securities was caused by defendants' misrepresentations and not by the overall decline in the fortunes

of the company. In this case, such proof is complicated because there was no sudden drop in the market value of Western Union securities as a result of disclosure by Western Union of prior misrepresentations. The amended complaint names November 29, 1988 as the pivotal date for measuring damages because on that day it became apparent that the reorganization had failed when the Western Union board announced the cancellation of dividend payments. However, the Western Union securities did not suddenly drop in value after the November 29, 1988 announcement; rather, Western Union securities had been steadily declining in value since peaking in February, 1988. In addition, holders of reset notes will have difficulty proving any pecuniary loss because present holders of reset notes were repaid all principal and interest prior to the filing of the bankruptcy and substantially all the interest subsequent to bankruptcy. (Plain. Memo in support of class cert. at 37 n.9.)

This factor also strongly favors approval of the settlement.

6. The risk of not maintaining the class action through the trial

Here, there is little chance that the class would not be certified and that certification would not be maintained. While there are subclasses in this action, as previously noted there are no conflicts or antagonisms between the subclasses that would prevent the maintenance of a single class action. This

factor is, therefore, a neutral one.

7. The defendants' ability to withstand a greater judgment

The ability of the defendant to pay more is a neutral factor in that the court has no specific information on this issue. Although Western Union entered bankruptcy proceedings shortly after plaintiff filed the amended complaint, the status of Western Union as of the time of settlement is unclear.

Regarding the individual defendants, it appears that LeBow had sufficient funds to contribute to settlement but there is probably no insurance coverage.

In sum, the court does not find that this factor particularly favors settlement because there is not sufficient proof that defendants have a limited ability to pay.[3]

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[3] The actions of the bankruptcy court are a fait accompli with respect to this court's appraisal of the fairness of the cash value of the settlement in that it would be difficult to overturn that amount without extensive collateral litigation. The court is surprised that plaintiff was able to file and maintain a proof of claim on behalf of an uncertified class action in the bankruptcy proceedings, and troubled by due process implications of binding absent class members to the bankruptcy court's decision limiting the amount recoverable from Western Union. See In re Sacred Heart Hospital Of Norristown, 177 B.R. 16, 22 (Bankr. E.D. Pa. 1995) (holding that class proof of claim forms may be utilized where class has been certified pre-petition or where bankruptcy court, after rigorous scrutiny, itself decides class meets Fed. R. Civ. P. 23 requirements); In re Zenith Laboratories, 104 B.R. 659, 664 (D.N.J. 1989) (holding class proof of claims should be permitted in adversary proceedings when bankruptcy judge has applied Fed. R. Civ. P. 23 to contested matter). However, these concerns are moot because, as explained elsewhere, the court has determined after an independent evaluation that $300,000 is a reasonable settlement

8. The range of reasonableness of the settlement fund in light of the best possible recovery and all the attendant risks of litigation

The settlement was within the range of reasonableness in light of the risks of litigation and in light of the best recovery. As outlined above, the risk of establishing liability and the risk of establishing damages were extremely high. Basically, plaintiff would have little chance of establishing liability and little chance of establishing damages. The settlement appears largely based on the costs of defense and the time involved to defend the case. Defendants were unwilling to settle for the corporation only and not for the individual defendants as well because defending a lawsuit against one or more of the individuals would cost just as much as defending against the corporation and the individuals so that the settlement had to be for all participants or none.

In addition, settlement negotiations were conducted at arm's length, and the amount was negotiated independently of the bankruptcy proceedings, based on the merits of the claim as appraised by counsel experienced in similar litigation. The parties entered into settlement negotiations after plaintiff's counsel filed a proof of claim in the Western Union bankruptcy proceeding and, after the parties reached agreement, Western

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of class claims against Western Union defendants.

Union applied to the bankruptcy court for approval of the settlement. Counsel for plaintiff, R.Bruce McNew, Esq., has fourteen years exclusive practice in complex litigation, class actions, securities litigation and investor's rights litigation. Similarly, counsel for Western Union, Robert L. Hickok, Esq., has thirteen years experience in a private practice much of which has involved defending director and officer breach of fiduciary duty claims and cases of a similar nature. This factor, therefore, also strongly favors the settlement.

Finally, the court concludes that there was no preferential treatment for the class representative and there was no unduly preferential treatment of segments of the class. Persons who purchased reset notes at the public offering are awarded damages based on the difference in the cost of the notes when acquired and the market value of the notes on November 30, 1988.[4] Persons who acquired Class A and B shares in the merger exchange are awarded damages based on one tenth of the difference between the market value of the shares at the time of the reorganization and their value on November 30, 1988. Similarly, persons who purchased Western Union securities on the open market during the class period are awarded damages based on one tenth of the difference of the price paid and the price on November 30, 1988. The ten to one allocation is the only issue in regard to

[4] For all three subclasses, the settlement calculates damages by reference to the market price on the date the securities were sold if the securities were sold before November 30, 1988.

intra-class preference.

The purchasers of the reset notes are given a ten to one preference over Class A and B shareholders because they invested new money into the corporation; whereas, the holders of the Class A and B shares had previously invested. The ten to one allocation in favor of the reset note holders reflects the fact that the Class A and B shareholders would have greater difficulty in proving damages than the reset note holders had the case gone to trial. The reset note holders would have to prove that, as a result of defendants' misrepresentations, the reset notes were worth less than the cash paid for them. The Class A and B shareholders, in contrast, would have to prove that the Class A and B shares were worth less than the securities for which they were exchanged--the WUTCO 10% subordinate debentures. In light of Western Union's financial difficulties, the WUTCO debentures were of dubious value and, consequently, the Class A and B shareholders likely sustained little or no damages as a result of the securities exchange.

In addition, the ten to one allocation in favor of reset note holders is a reasonable allocation in light of other competing considerations. The settlement uses a method for calculating losses that is beneficial to Class A and B shareholders. The Class A and B shareholders have their losses valued on the basis of the total decline in the value of the shares during the class period. That calculation greatly over estimates losses because the shares were obtained in exchange for

existing debentures in a near bankrupt company and yet the settlement, in effect, treats the losses for these shares as if they were purchased with new money. However, the overly generous method for calculating losses for Class A and B shares cancels out the fact that, in contrast to the reset note holders, this subclass did not later recover its full investments from the Western Union bankruptcy.

The ten to one preference in favor of persons who purchased reset notes at the December, 1987 public offering over market purchasers of Western Union securities also reflects the latter's more substantial burden for proving culpability. As previously stated, market purchasers would have to prove extreme reckless conduct or fraud to recover, whereas investors who purchased securities directly from Western Union would only have to prove negligent misrepresentations or omissions by the issuer.

In sum, all factors, except the adequacy of discovery, being either positive for settlement or neutral, the court concludes that the settlement was fair, reasonable, and adequate.

D. Count III of Plaintiff's Complaint

The court grants defendants' motion to dismiss Count III of plaintiff's amended complaint. Count III alleges a claim on behalf of owners of class A and B shares for breach of fiduciary duty by Western Union defendants with respect to a proposed recapitalization plan pursuant to which class A and B shares would be exchanged for new common stock. The proposed

recapitalization plan was never undertaken or consummated by Western Union. Instead, Western Union sought other means of dealing with its ongoing financial difficulties, ultimately ending in bankruptcy proceeding. As a consequence, the court concludes that Count III of plaintiff's amended complaint should be dismissed as moot.

E. Plaintiff's Petition for Award of Costs and Attorneys' Fees from the Western Union Settlement

"A litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980). The Third Circuit has expressed a preference for the percentage-of-recovery method for calculating reasonable attorney fees in class settlements, except in statutory fee shifting cases where the lodestar method is preferred. In re GM Pick-Up Truck Litig., 55 F.3d at 821. Fee awards have ranged from nineteen percent to forty five percent, In re Smithkline Beckman Corp. Secur. Litig., 751 F. Supp. 525 (E.D. Pa. 1990), although the normal range for common fund fee awards is twenty to thirty percent. 3 H. Newberg, Newberg on Class Actions at 190 (2d ed. 1985). In addition, it is now the policy of this court to award attorneys' fees based on a percentage of the net settlement fund rather than the gross settlement fund. Lachance v. Harrington, No. 94-4383, slip op. at 40 (E.D. Pa. Apr. 2, 1997). Whatever the fee,

judicial approval is required in all class action settlements. In re GM Pick-Up Truck Litig., 55 F.3d at 821.

Here, plaintiff requests an attorneys' fee of twenty five percent of the gross settlement, which is in the middle of the normal range of recovery. The court finds counsel's request reasonable in light of the time counsel expended in pursuing this litigation, and the complexity of the litigation. See also infra opinion at 35-36, discussion on lodestar comparison. However, in line with the policy enunciated in Lachance, the court awards counsel a fee of twenty five percent of the net recovery rather than the gross recovery. See Lachance, slip op. at 40.

In addition, the court grants counsel's request for costs of $22,049.69. The court has reviewed the specific costs and found them reasonable.[5]

Therefore, after costs, the net recovery against Western Union is $277,950.31, and counsel is awarded fees of $69,487.58.

F. Plaintiff's Petition for Award of Attorneys' Fees from the Drexel Estate Settlement

[5] The application for costs submitted by counsel for plaintiff includes litigation costs incurred in pursuing the Drexel bankruptcy. Counsel for plaintiff has not submitted a claim for administrative costs with respect to the Drexel bankruptcy because counsel will apply to the New York court for such costs. Counsel for plaintiff has certified to the court that the payment of administrative costs through the New York court will not affect the sum available to the class from the Drexel Estate.

As stated earlier, the bankruptcy court for the Southern District of New York has certified the class and approved settlement of the class claims against Drexel. At present, $1,690,078 is available for distribution and counsel for plaintiff has submitted a request for an award of attorneys' fees from the settlement of twenty-five percent of the recovery. Counsel has certified that, thus far, no fees or litigation costs have been awarded or paid by the New York court with respect to the Drexel bankruptcy settlement, and the court's approval of costs and attorneys' fees is based on that certification.

The court finds that counsel's request for attorneys' fees of twenty five percent of the recovery against the Drexel estate is reasonable. The percentage is in the middle of the normal range, and the amount is reasonable in light of the amount of time that lapsed since the suit was commenced, and the complexity of having to deal with litigation in four separate courts-- the Bankruptcy Court for the Southern District of New York, the District Court for the Southern District of New York, the Bankruptcy Court for the District of New Jersey, and this court. The court, therefore, awards plaintiff's counsel attorneys' fees of twenty five percent of the net recovery against the Drexel Estate, which equals $422,519.50. The Court of Appeals has indicated that even when using the percentage of recovery method, the amount produced can be cross-checked with the amount produced by the lodestar method "to assure that the precise percentage award does not create an

unreasonable hourly fee." In re GM Pick-Up Truck Litig., 55 F.3d at 822. The lodestar method calculates fees by multiplying the number of hours expended by counsel by some appropriate hourly rate. Id. at 819 n.37. Here, plaintiff's counsel has submitted details of the total number of hours expending in litigating claims against both the Western Union defendants and Drexel. Unfortunately, counsel has not indicated what percentage of its lodestar was attributable to hours spent litigating claims against the Western Union defendants and hours spent litigating claims against Drexel, probably because there was an undetermined amount of overlap. Nevertheless, with the data supplied by counsel, the court can determine whether the total fees requested by counsel is reasonable in light of the overall lodestar. As of December 16, 1996, plaintiff's counsel represents that they have spent 1,599.75 professional hours pursuing litigating claims against Drexel and the Western Union defendants. Based on this total, plaintiff's counsel has submitted a lodestar of $315,000. In light of that lodestar calculation, the court concludes that an attorneys' fee award of twenty five percent of the net recovery against Western Union and Drexel, which equals $492,007.08, does not create an unreasonable attorney fee. See Local 56, United Food and Commercial v. Campbell, 954 F.Supp. 1000, 1005 n.7 (D.N.J. 1997) (finding that percentage of recovery award that was more than two times the lodestar was reasonable); J/H Real Estate Inc. v. Abramson, 951 F. Supp. 63, 65 (E.D. Pa. 1996) (finding that fee award more than 2.5 times the lodestar is

"generous but fair premium").

Finally, counsel for plaintiff has not requested reimbursement of costs of distribution of funds derived from the Drexel Estate because plaintiff's counsel has applied to the New York court for payment of such costs. However, counsel has submitted a claim for litigation costs relating to the Drexel Estate, and that sum is included in counsel's claim for costs incurred with respect to Western Union defendants.[6]

IV. CONCLUSION

The court grants plaintiff's motion for class certification in connection with the claims against the Western Union defendants, and finds that the proposed settlement of class claims against Western Union defendants for $300,000 is fair, reasonable and adequate. Further, the court approves plaintiff's application for costs, and for attorneys' fees of 25% of the net

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[6] The Drexel settlement is comprised of two funds: $835,483 in the Drexel Civil Disgorgement Fund and $854,595 in the Drexel Securities Litigation Settlement Fund. The District Court for the Southern District of New York has ordered that attorneys' fees are not to be paid from the disgorgement fund. However, this court may include the disgorgement fund in its calculation of the percentage of recovery, provided that attorneys' fees do not cut into the disgorgement fund. See In re Drexel Burnham Lambert Group, Inc., No. 90-6954 (S.D.N.Y. Aug. 18, 1994) (approving Amended Joint Plan of (1) Distribution of Securities Litigation Settlement Fund B for Subclass B Claimants and (2) Distribution of the Potion of the Drexel Civil Disgorgement Fund for Eligible Group B Claimants, ¶ 48). Here, the attorneys' fees award can be paid entirely from the Western Union settlement and the Drexel Securities Litigation Settlement Fund. No attorneys' fees would be paid from the Drexel Civil Disgorgement Fund.

recovery against Western Union defendants and Drexel.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LILLIAN B. GOMBERG, on behalf of herself and all others similarly situated Plaintiff v. WESTERN UNION CORPORATION, WILLIAM WEKSEL, WESTERN UNION TELEGRAPH CO., ROBERT J. AMMAN, DREXEL BURNHAM LAMBERT, INC., and BENNETT S. LEBOW Defendants	:	CIVIL ACTION NO. 89-8499

ORDER AND FINAL JUDGMENT

A hearing having been held before this court on January 31, 1997, pursuant to this court's order dated October 24, 1996, upon a stipulation of settlement (the "stipulation") filed in the above-captioned action (the "action"); it appearing that due notice of said hearing having been given in accordance with the aforesaid order; the respective parties having appeared by their attorneys of record; the court having heard and considered evidence in support of the proposed settlement (the "settlement") set forth in the stipulation; the attorneys for the respective parties having been heard; an opportunity to be heard having been given to all other persons requesting to be heard in accordance with the court's October 24, 1996 order; the court having determined that notice to all persons who were damaged as a result of the wrongs alleged and (1) who acquired Western Union Corporation ("Western Union") securities pursuant to the prospectus dated October 27, 1987, and supplemented thereafter, whereby, inter alia, holders of Western

Union Telegraph Company ("WUTCO") 10 3/4% Subordinated Debentures received for each $1,000 principal amount of such subordinated debentures 2.4 $15.00 Class A Increasing Rate Cumulative Senior Preferred Shares ($100 liquidation value) (the "Class A shares") and 14.4 $3.00 Class B Cumulative Convertible Preferred Shares ($25 liquidation value) (the "Class B shares") of Western Union pursuant to the merger of WUTCO and Western Union; (2) who acquired Western Union securities from December 30, 1987 through November 29, 1988, inclusive; and (3) who acquired Senior Reset Notes of Western Union pursuant to a public offering on or about December 30, 1987; excluding Western Union, WUTCO, William Weksel, Robert J. Amman, Bennett S. LeBow, and the Drexel Debtors, members of the Board of Directors of Western Union and its Executive Management Group, members of their immediate families and any subsidiary or affiliate, was adequate and sufficient; and the entire matter of the proposed settlement having been heard and considered by the court;

IT IS ORDERED, ADJUDGED and DECREED this _____ day of June, 1997 as follows:

A. <u>Findings With Respect To This Proposed Settlement With Western Union Corporation, William Weksel, Western Union Telegraph Co., Robert J.Amman, and Bennett S. LeBow</u>

The following findings are made with respect to the proposed settlement with defendants Western Union Corporation, William Weksel, Western Union Telegraph Co., Robert J. Amman, and Bennett S. LeBow.

1. On or before November 15, 1996, the notice of

proposed class action settlement, settlement hearing, and right to appear (the "notice") was mailed or otherwise provided to all persons who were damaged as a result of the wrongs alleged, as they are ascertainable from the records of New Valley Corporation and elsewhere, and (1) who acquired Western Union securities pursuant to the Prospectus dated October 27, 1987, and supplemented thereafter, whereby, inter alia, holders of WUTCO 10 3/4% Subordinated Debentures received for each $1,000 principal amount of such subordinated debentures 2.4 Class A shares and 14.4 Class B shares of Western Union pursuant to the merger of WUTCO and Western Union; (2) who acquired Western Union securities from December 30, 1987 through November 29, 1988, inclusive; and (3) who acquired Senior Reset Notes of Western Union pursuant to a public offering on or about December 30, 1987; excluding Western Union, WUTCO, William Weksel, Robert J. Amman, Bennett S. LeBow, and the Drexel Debtors, members of the Board of Directors of Western Union and its Executive Management Group, members of their immediate families and any subsidiary or affiliate.

2. Due and adequate notice of the proceedings having been given to members of the class, and a full opportunity having been offered to the class to participate in this hearing, it is hereby determined that all members of the class who did not exercise the right to be excluded from the class pursuant to Rule 23(C)(2) of the Federal Rules of Civil Procedure are bound by the order and final judgment entered herein.

3. The stipulation and the terms of the settlement as

described in the stipulation and the notice are hereby approved and confirmed as being fair, reasonable and adequate to all members of the class; the parties to the stipulation are directed hereby to consummate the settlement in accordance with the terms and conditions set forth in the stipulation; and the clerk of this court is directed to enter and docket this order and final judgment in this action.

4. Count three of the amended complaint, asserted on behalf of a class of all persons who held Class A or Class B shares at the time of the filing of the amended complaint, is hereby dismissed with prejudice as moot.

5. The action against the defendants is hereby compromised, settled, released and dismissed with prejudice as against the named plaintiff and all members of the class without costs (other than those class members who have been excluded), and the released parties, as that term is defined in the stipulation, are hereby discharged and released from any and all released claims, as that term is defined in the stipulation.

6. The named plaintiff and all members of the class (other than those class members who have duly filed requests for exclusion), their present or former officers, directors, agents, employees, attorneys, and advisors are hereby individually and severally permanently barred and enjoined from instituting, commencing, prosecuting or continuing any suit or other proceeding whether directly, representatively, derivatively, individually or in any capacity, against any of the released parties, as that term

is defined in the stipulation, in any court or tribunal of this or any other jurisdiction based upon or for the purpose of enforcing any released claims, as that term is defined in the stipulation, all of which released claims are hereby declared to be compromised, settled, released, dismissed with prejudice and extinguished by virtue of the proceedings in this action and this order and final judgment.

B. "Home Court" Findings With Respect to Proceedings Involving Claims Against Drexel Burnham Lambert, Inc.

The following findings are made with respect to the claims asserted against Drexel Burnham Lambert, Inc. in connection with this Court's role as a "home court" as set forth in the Joint Plan of Distribution in In re the Drexel Burnham Lambert group Inc., et al., 90 CIV 6954 (MP) (S.D.N.Y.), and SEC v. Drexel Burnham Lambert Inc., et al., 88 CIV 6209 (MP)(S.D.N.Y.)

7. The following paragraph is included herein, since the Eastern District of Pennsylvania is a "home court" for purposes of this litigation insofar as it involves claims against Drexel Burnham Lambert, Inc., in order to meet the criteria established by the United States District Court for the Southern District of New York: In accordance with the Joint Plan of Distribution in In Re The Drexel Burnham Lambert Group Inc., et al., 90 CIV 6954 (MP)(S.D.N.Y.), and SEC v. Drexel Burnham Lambert Inc., et al., 88 CIV 6209 (MP)(S.D.N.Y.), this court as a "home court" orders that plaintiff's claims against the Western Union defendants have been

certified for class action treatment and that this class is the same class as the class in the Drexel Burnham Lambert subclass B action, and further orders that this court's approval of the distributions of funds to the class from the Drexel bankruptcy is contingent on the following: (a) that the court grants all final approvals for the distribution, including the appropriate pro rata inter se distributions to the class members in the underlying class action and all claims administration matters related thereto; (b) that the funds are ready to be distributed to the underlying class members; (c) that all funds shall be appropriately safeguarded to the satisfaction of this court, the Subclass B Executive Committee and the SEC Representative until such inter se distributions are complete; (d) that an accounting of all administrative expenses to be paid out of any funds distributed from the Drexel Civil Disgorgement Fund shall be provided to and approved by the SEC Representative; and (e) that no attorneys' fees shall be paid from any funds distributed from the Drexel Civil Disgorgement Fund.

8. No defendant has nor hereafter shall assert a "claim over" as defined in the Securities Litigation Claims Settlement Agreement dated May 3, 1991 in In Re The Drexel Burnham Lambert Group Inc., et al., 90 CIV 6954 (MP)(S.D.N.Y.).

9. Defendants, and each of them, including their respective present or former officers, directors, employees, attorneys or advisors, by consenting to the entry of this order, do release and discharge plaintiff, its agents and attorneys from any and all claims, rights, causes of actions, suits, matters and

issues which arise from or relate to the initiation, prosecution and settlement of this action.

C. Findings With Respect to Settlement Administration and With Respect to Both the Settlement and "Home Court" Matters

10. Upon completion of the claims processing by the claims administrator, Rudolph, Palitz LLP, a final report of the claims administrator shall be submitted to the court for approval. Prior to that time, a status report as to claims processing shall be submitted to this court every 90 days. No funds will be distributed to class members without further order of the court. The invoices submitted by the claims administrator may be paid from the existing settlement fund with notice to counsel for the defendants and the court. Attorneys' fees and expenses shall be paid in accordance with directions of this court in paragraph 11 hereof. The claims processing shall proceed in accordance with the plan outlined in the stipulation of settlement.

11. Attorneys' fees of $69,487.58 and out-of-pocket disbursements in the amount of $22,049.69 are awarded to plaintiff's counsel for services on behalf of plaintiff and for expenses incurred in connection with the prosecution and settlement of claims against Western Union defendants, and attorneys' fees of $422,519.50 are awarded to plaintiff's counsel for services on behalf of plaintiff in connection with the prosecution and settlement of claims against the Drexel Estate, which sums the court finds to be fair and reasonable. Such fees and disbursements

are to be paid in accordance with the provisions of the stipulation.

12. The defendants do not admit either expressly or impliedly that any of them are subject to any liability with regard to any claim that is a released claim as defined above. This order and final judgment shall not constitute any evidence or admission by any of the defendants hereto or any other person that any acts of negligence or wrongdoing of any nature have been committed and shall not be deemed to create any inference that there is any liability therefor.

13. Without in anyway affecting the finality of this order and final judgment, jurisdiction is hereby retained by this court for the purposes of protecting and implementing the stipulation and the terms of this order and final judgment, including the resolution of any disputes that may arise with respect to the effectuation of any of the provisions of the stipulation, and for the entry of such further orders as may be necessary or appropriate in administering and implementing the terms and provisions of the settlement and this order and final judgment.

BY THE COURT

_____
WILLIAM H. YOHN, JR., Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LILLIAN B. GOMBERG, on behalf of :
: CIVIL ACTION

herself and all others similarly situated :
P l a i n t i f f :
:
v. :
:
WESTERN UNION CORPORATION, WILLIAM WEKSEL, : NO. 89-8499
WESTERN UNION TELEGRAPH CO., ROBERT J. :
AMMAN, DREXEL BURNHAM LAMBERT, INC., and :
BENNETT S. LEBOW :
Defendants:
_____:

ORDER OF CLASS CERTIFICATION

WHEREAS, plaintiff moved for class certification on September 30, 1991, which motion initially was opposed by the defendants; and

WHEREAS, the parties, by stipulation approved by this court on February 28, 1997 substituted, nunc pro tunc from October 11, 1990, Lillian B. Gomberg, Administratrix of the Estate of M. Harrison Bohrer, for Mr. Bohrer, the plaintiff who initiated this action but died on April 3, 1990, which stipulation was based upon affidavits, declarations, and documents provided to the court establishing that Ms. Gomberg was appointed the Administratrix of the Estate and was aware of and approved the proposed settlement which was also before the court; and

WHEREAS, the foregoing stipulation mooted one of the

objections of the defendants to class certification; and

WHEREAS, the plaintiff has withdrawn her motion for certification of a subclass relating to Count III of the complaint, which alleged a breach of fiduciary duty in connection with a proposed transaction, on the basis that the transaction never occurred; such withdrawal mooted this objection of defendants to certification; and

WHEREAS, in connection with the settlement, the defendants withdrew their objections, including, specifically, that the class motion was not brought within ninety (90) days as required by Eastern District Local Rule of Civil Procedure 27(c), now Rule 23.1(c), and that the subclasses sought to be represented could not adequately be represented by a single plaintiff; and

NOW UPON CONSIDERATION of the submissions of the party with respect to class certification,

IT IS HEREBY ORDERED AS FOLLOWS:

1. Ms. Gomberg has demonstrated she is an adequate representative for the class and each of the subclasses for which certification is presently sought for purposes of effectuating the settlement. She has demonstrated both the legal capacity to act as the successor to M. Harrison Bohrer and that she acted as Administratrix of his Estate and further demonstrated a knowledge of communications with counsel during the pendency of litigation and, in particular, with respect to the proposed settlement. Ms. Gomberg's substitution as the plaintiff in this action, nunc pro tunc, effectively cures the objection asserted by

the defendants of having the Estate of M. Harrison Bohrer act as a class representative.

2. Count III of the amended complaint, relating to the alleged breach of fiduciary duty with respect to a proposed transaction that, as events turned out, did not occur, asserted claims which are now moot. As a result, the withdrawal by plaintiff of its request for certification of a class relating to those claims is appropriate and effectively moots the defendants' challenged class certification on that ground.

3. The challenge to class certification by the defendants on the grounds that the motion was not timely under Local Rule of Civil Procedure is denied. Plaintiff demonstrated the absence of any prejudice arising from that delay and provided an explanation as to why the delay occurred.

4. The defendants' challenge with respect to a single representative acting on behalf of all of the subclasses is denied. Plaintiff demonstrated that there were no conflicts among the subclasses which would preclude effective representation by a single representative.

5. Plaintiff submitted evidence that the notice to the class was mailed to over 60,000 persons, specifically, as evidenced by the Affidavit of Mailing, the initial mailing was made to 30,867 people from records provided by Western Union. Plaintiff further established that subsequent to that mailing, as a result of requests received from brokers and nominees, an additional 29,437 notices were mailed. These factors

establish the class is sufficiently numerous that joinder of all members is impractical.

6. The claims asserted on behalf of the class arise from an alleged course of conduct which uniformly affected the rights of all class members. This establishes that there are questions of law or fact common to the class. Similarly, based on this and the plaintiff's membership in the class, the claims of plaintiff are typical of the class.

7. The court also received evidence of the knowledge and experience of counsel and the conduct of counsel in the course of the litigation. These factors, along with the factors relating to the plaintiff individually, establish that plaintiff will and has fairly and adequately protected the interests of the class.

8. The court also considered that individual members of the class had little or no interest in controlling the prosecution or defense of separate actions. Aside from this action (including the actions commenced by plaintiff with respect to the Western Union bankruptcies and the proceedings In re Drexel Burnham Lambert Group, Inc., et al., 90 CIV 6954 (MP)(S.D.N.Y.), and SEC v. Drexel Burnham Lambert, Inc., et al., 88 CIV 9209 (MP)(S.D.N.Y.)), no other litigation concerning the controversy was commenced by any member of the class. Considering the nature of the claims, it was desirable to concentrate the litigation in a single forum and any difficulties likely to be encountered in managing this as a class action could be adequately managed.

9. The court considered that the defendants withdrew their objections to class certification in connection with the settlement and, as a result, the court considered various factors and determined that there was no indication from the terms of the settlement which would raise questions of adequacy of representation. Among those factors considered were the following:

a. Any fees to be paid by counsel are not separate and apart from the recovery of the common fund on behalf of the class. Thus, there is no potential conflict of interest between attorneys seeking fees and seeking to maximize the recovery for the class.

b. The disparity between recovery on behalf of the subclasses relates to the strengths of the claims asserted, which disparity was discussed at the final settlement hearing and in the notice to the class.

c. The notice to the class adequately and fully explained all aspects of the settlement, including the amount of attorneys' fees sought.

d. No claims which were materially different were aggregated for similar treatment.

e. The settlement in no way impaired the ability to identify potential class members, the likely extent of liability, damages, and the expense of preparing for trial.

f. There were no competing class actions which might provide an incentive for settlement with the least aggressive plaintiff.

g. Plaintiff's counsel moved for certification prior to settlement discussions. The defendants initially opposed certification prior to settlement discussions. This circumstance provided reasonable assurance that all arguments which reasonably could be made in opposition to class certification were advanced by defendants.

h. Because the settlement is a cash settlement, the value of the settlement to the class is easily established, and because counsel seeks payment from that fund, counsel had every incentive to obtain as large a recovery as possible.

10. Based upon the foregoing and the findings and conclusions in the accompanying memorandum, plaintiff's motion for class certification is granted. This action shall proceed as a class action pursuant to Federal Rule of Civil Procedure 23 on behalf of a class ("the class), defined as follows:

a. All persons who were damaged as a result of the wrongs alleged and (1) who acquired Western Union Corporation ("Western Union") securities pursuant to the Prospectus dated October 27, 1987, and supplemented thereafter, whereby, inter alia, holders of Western Union Telegraph Company ("WUTCO") 10 3/4% Subordinated Debentures received for each $1,000 principal amount of such subordinated debentures, 2.4 $15.00 Class A Increasing Rate Cumulative Senior Preferred Shares ($100 liquidation value) (the "Class A shares") and 14.4 $3.00 Class B Cumulative Convertible Preferred Shares ($25 liquidation value) (the "Class B shares") of

Western Union pursuant to the merger of WUTCO and Western Union; (2) who acquired Western Union securities from December 30, 1987 through November 29, 1988, inclusive; or (3) who acquired Senior Reset Notes of Western Union pursuant to a public offering on or about December 30, 1987.

b. Excluded from the class are Western Union, WUTCO, Robert J. Amman, Bennett S. Lebow, Drexel Burnham Lambert, Inc., members of the Board of Directors of Western Union and WUTCO and their executive management group, members of their immediate families and any subsidiary or affiliate of any such entity.

c. At the settlement hearing, counsel presented requests for exclusion on behalf of Helen L. Dysert, Ruth F. Goldberg c/f Mark Alan Goldberg, Bernice Harris and Harold Garber, Mrs. Charles A. Klein, Albert and Constance H. Southard, and Pierre R. Thyvaert. The parties have indicated that Salvatore Castelli also requested exclusion, although his request was not technically timely. No party objects to Mr. Castelli's exclusion. Therefore, all of the foregoing persons are excluded from the class based on their requests.

d. Ms. Gomberg, Administratrix of the Estate of M. Harrison Bohrer, is designated as class representative and Taylor, Gruver & McNew is designated as counsel for the class.

SO ORDERED this _____ day of June, 1997.

BY THE COURT

_____

William H. Yohn, Jr., Judge